No. 76-1771

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In the Supreme Court of the United States

OCTOBER TERM, 1977

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, PETITIONERS

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-21) is not yet reported. The orders of the Civil Aeronautics Board (Pet. App. 22-54) are not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1977 (Pet. App. 1-2). The petition for a writ of certiorari was filed on June 11, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 49 U.S.C. 1486(f).

QUESTION PRESENTED

Whether the court of appeals properly declined to consider petitioner's challenge to a preliminary statement by the Civil Aeronautics Board—that "air service at Lake Tahoe is interstate in nature"—when petitioners have suffered no injury from that statement and the Board is currently re-examining the question on a full adjudicatory record.

STATUTE INVOLVED

The relevant provisions of the Federal Aviation Act of 1958, 72 Stat. 731, as amended, 49 U.S.C. 1301 *et seq.*, are set forth at Pet. App. 55-58 and at note 1, *infra*.

STATEMENT

1. Pacific Southwest Airlines ("PSA") and Air California ("Air Cal") are intrastate carriers certificated by petitioner California Public Utilities Commission ("PUC") to provide intrastate air service to Lake Tahoe, California, from several California cities (Pet. App. 9). In March 1975, PSA and Air Cal filed with the Civil Aeronautics Board (the "Board") applications for exemption from federal regulation pursuant to Section 416(b)(1) of the Federal Aviation Act (49 U.S.C. 1386(b)(1)), which authorizes the Board to exempt an air carrier from the economic regulatory provisions of the Act, including the requirement that it obtain a certificate of convenience and necessity before engaging in interstate air transportation.[1] The applications

[1]Section 416(b)(1) provides that "[t]he Board * * * may * * * exempt from the requirements of this title * * *, any air carrier or class of air carriers, if it finds that the enforcement of this title * * * is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest."

sought exemptions to hold out, promote, and serve bordering Nevada destinations on flights to Lake Tahoe (see Pet. App. 22-23).[2]

The Board, on June 27, 1975, exempted PSA and Air Cal for six months from the requirements and provisions of the Act "to the extent that they would otherwise prevent the carrier[s] from engaging in [interstate] air transportation" to Lake Tahoe (Pet. App. 31). The exemptions permitted PSA and Air Cal to serve Nevada destinations on Lake Tahoe flights from Los Angeles and Burbank, in the case of the former, and Oakland and San Jose, in the case of the latter (*ibid.*).

The Board, however, limited the exemptions by prohibiting PSA and Air Cal from connecting or "tacking" other intrastate flights to the Lake Tahoe flights.[3] The limitation was intended to isolate the carriers' interstate Lake Tahoe operations from their extensive intrastate route systems to insure that they would retain their intrastate character (Pet. App. 28). The Board expressed the "view" that "air service at Lake Tahoe is interstate in nature by definition," the Board having found in previous proceedings that "more than a *de minimis* number

[2]Lake Tahoe is a popular resort area that straddles the California-Nevada border. Many of the hotels and major tourist attractions, including gambling casinos and ski resorts, are situated on the Nevada side of the border, but the airport serving the area, the Tahoe Valley Airport, is located on the California side (Pet. App. 22, n. 1). PSA requested exemption authority to serve Nevada destinations from San Diego, Burbank and Los Angeles (Pet. App. 23, n. 2). The exemption application filed by Air Cal covered service from Oakland, Ontario, Palm Springs, San Diego, San Francisco, San Jose and Santa Ana (*ibid.*).

[3]Thus, for example, PSA cannot utilize its Lake Tahoe exemption to carry passengers from San Diego via Los Angeles to Lake Tahoe.

of passengers moving by air between Lake Tahoe and other California points originate or terminate their journeys in Nevada" (Pet. App. 29-30).

2. In response to applications from PSA and Air Cal for renewal of their exemption authority, the Board decided in March 1976, (1) to institute a proceeding designated as the *Lake Tahoe Service Investigation* (the "*Investigation*") to consider future service in the Lake Tahoe market, and (2) to extend, without modification, the outstanding exemptions pending the outcome of the *Investigation* (Pet. App. 45),[4] While noting that it "remain[ed] convinced that air service at Lake Tahoe is interstate in character under prevailing law," the Board noted that the *Investigation* would provide a forum for petitioner PUC and other interested persons "to present empirical evidence to the contrary" (Pet. App. 49). It ordered that an evidentiary record be developed to "determine with reasonable precision the intrastate/interstate mix of these passengers" (Pet. App. 50).

The *Investigation* is now in its final stages. PSA and Air Cal each has filed applications in the alternative for a certificate of convenience and necessity or an exemption without the prohibition on "tacking," which applications are being considered in the *Investigation*. The evidentiary hearings have been completed and the target date for issuance of the administrative law judge's decision is September 23, 1977.

3. Petitioner PUC filed a petition in the court of appeals seeking review of the Board's "view" that "air service at Lake Tahoe is interstate in nature by definition." The

[4]The exemptions were extended to January 24, 1978, or until 60 days after final decision in the *Investigation*, whichever occurs first (Pet. App. 53).

court, with one judge dissenting, affirmed the Board's grant of exemptions (Pet. App. 3-7). It concluded that the challenge by PUC was "premature" in view of the now pending *Investigation* and did not present an appropriate matter for judicial review (Pet. App. 6-7).

ARGUMENT

The court of appeals correctly declined to reach the merits of this controversy on the present record, and that decision does not warrant review by this Court.

1. Although the question whether carrier service from California cities to Lake Tahoe constitutes interstate travel may ultimately prove a fit subject for judicial review, the opinion expressed by the Board in the orders now appealed is at most preliminary and tentative. Indeed, the Board itself has indicated that its view is not settled by instituting an investigation into that very question, at which petitioners have a full opportunity "to present empirical evidence to the contrary" (Pet. App. 49). Under the circumstances, the court of appeals properly concluded that "[t]here later will be ample opportunity to define the legal principles differentiating interstate from intrastate air service in the Tahoe region based on solid factual premises" (Pet. App. 7).

To justify immediate judicial review of this matter, petitioners suggest that the Board's orders "can only serve to deprive the citizens of California of service previously authorized by the California Commission" (Pet. 12). But PSA and Air Cal are now operating precisely as they were before the Board's orders: within the jurisdiction of the PUC. The carriers have chosen not to limit their operations in the manner set forth in their exemptions but instead to conduct operations to the full extent permitted by their state

certificates.[5] Thus, at the present time, both PSA and Air Cal are "tacking" or connecting other intrastate flights onto their Lake Tahoe flights, as permitted by their state certificates, although the Board declined to allow "tacking" or connecting in granting exemption authority to the carriers (Air Cal Brief in Support of Certiorari, p. 3; letter from PSA to CAB, in CAB Docket 27606, dated December 20, 1976, App., *infra*).[6]

In view of the pending investigation, there is no reasonable likelihood that the Board will initiate enforcement proceedings against the carriers at this time. The Board's announced view regarding the inherently-interstate nature of Lake Tahoe service at most raises the possibility that, should that view be reaffirmed after the *Investigation*, the regulatory authority of the Board and that of the PUC will come into conflict. Should the Board change its opinion, however, petitioners may suffer no adverse consequences at all. Thus, judicial review may reasonably be postponed until such time as "an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties" (*Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148-149).

2. On the merits, petitioners contend (Pet. 9-17) that there was insufficient evidentiary support for the Board's "view" of the interstate nature of Lake Tahoe service. However, as noted above (p. 5, *supra*), petitioner PUC is a party to the Board's pending investigation of that service

[5]Air Cal never used its exemption authority at any time (Air Cal Brief in Support of Certiorari, p. 3). PSA expanded its operations to included activities not permitted by its exemption in January 1977 (letter from PSA to CAB, in CAB Docket 27606, dated December 20, 1976, App., *infra*).

[6]Neither PSA nor Air Cal sought reveiw below of the limitations placed on their exemption requests (Pet. App. 5). PSA intervened in support of the Board's orders while Air Cal intervened in support of petitioners.

and has an opportunity for full participation in the evidentiary inquiry. As the court of appeals pointed out, "[t]here is an obvious need for a fuller record to settle the underlying jurisdictional dispute between these parties" (Pet. App. 7). The *Investigation*, which is now nearing completion, is expressly intended to satisfy that need. In these circumstances, judicial review of the jurisdictional question "not only deprives the [Board] of the opportunity to make the initial resolution of the issues but also prevents it from doing so in a more suitable context." *American Commercial Lines* v. *Louisville & Nashville R. Co.*, 392 U.S. 571, 592.[7]

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1977.

[7]Likewise, the Board in the *Investigation* is presently considering Air Cal's and PSA's applications for renewed exemption authority free from any prohibition on "tacking."

APPENDIX

PSA
PACIFIC SOUTHWEST AIRLINES

December 20, 1976

Mrs. Ruth B. Erlichman
Chief, Docket Section
Civil Aeronautics Board
Washington, D.C. 20428

Re: Application of Pacific Southwest Airlines
Docket No. 27606

Dear Mrs. Erlichman:

This letter is submitted for the purpose of advising the Board and interested persons of the position of Pacific Southwest Airlines (PSA) with respect to certain services which it plans soon to begin holding out and operating between San Diego and South Lake Tahoe. No action by the Board is requested.*

PSA plans to operate and hold out to the public single-carrier service in intrastate air transportation beginning in January 1977 between San Diego and South Lake Tahoe. PSA holds temporary authority from the California Public Utilities Commission to provide such service by tacking flights between South Lake Tahoe and Los Angeles or Burbank. However, PSA discontinued holding out such service following the CAB's assertion of jurisdiction over operations to and from South Lake Tahoe and its grant to PSA of exemption authority restricted to prohibit publication of schedules holding out the availability of single-

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*PSA assumes this letter will be placed in the correspondence file of the above-referenced docket. Copies have been sent to all persons who have participated in that docket and the related *Lake Tahoe Service Investigation*, Docket 29000.

carrier service in air transportation between South Lake Tahoe and any point in California other than Los Angeles or Burbank. (Order: 75-6-135, June 27, 1975).

In that decision the Board also granted Air California exemption authority between South Lake Tahoe and Oakland and San Jose similarly restricted to prohibit the holding out of schedules between South Lake Tahoe and all other points in California. Nevertheless, Air California continues to publish schedules, advertise, and otherwise hold out services between South Lake Tahoe and San Diego. Such service has been provided by single-plane and on-line connecting flights via Oakland and San Jose.

Air California operates such service despite the above-described restriction on the legal theory that it is not "using" its CAB authority but instead is operating under its temporary authority from the California Public Utilities Commission, which permits San Diego-Oakland/San Jose-Lake Tahoe service by tacking. Air California apparently maintains that its service is not interstate so long as it does not involve intercarrier arrangements, solicitation of interstate traffic, or other circumstances beyond the fact of carriage of a more than a *de minimis* number of interstate passengers. Although the Board's decisions on Lake Tahoe services and its arguments in the pending court case on judicial review reject Air California's position, the Board has apparently acquiesced in Air California's continued holding out service between Lake Tahoe on the one hand, and points in California other than Oakland and San Jose, particularly San Diego, on the other hand.

Although PSA pointed out this situation back on April 16, 1976 in its petition for reconsideration of the Board's renewal of Air California's exemption authority in Order 76-3-144, the Board still has not ruled on that petition.

Further, to our knowledge, the Board has not notified Air California that it is acting illegally.

This situation obviously has put PSA at an extreme disadvantage competitively and has causesd substantial loss of revenues. In these circumstances, PSA must match Air California's competition. At least until the legal situation is clarified and determined in the pending court case, the current Lake Tahoe Service Investigation, or other proceedings, PSA believes that this course is lawful, justified, necessary, and in the public service.

Very truly yours,

P S A - PACIFIC SOUTHWEST AIRLINES

/s/ W. R. Shimp

W. R. Shimp
President and
Chief Executive Officer